



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R07-OAR-2019-0711; FRL-10024-22-Region 7]

Air Plan Approval; Missouri; Construction Permits By Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving selected revisions to a Missouri State rule in the State Implementation Plan (SIP) that establishes a process and standardized conditions under which certain types of sources can construct and operate in lieu of going through the State's formal construction permitting process. The EPA is approving rule revisions that include modifications to the operating conditions for crematories and animal incinerators, adjustments to sulfur limits on Number 2 diesel oil for consistency with Federal limits, removal of "restrictive" words, addition of definitions specific to the rule, and other minor edits. At this time, the agency is not acting on revisions that conflict with an EPA regulation related to disposal of pharmaceuticals collected in drug take-back programs. The EPA's approval of the State's other rule revisions is being done in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R07-OAR-2019-0711. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov> or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

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SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to the EPA. This section provides additional information by addressing the following:

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I. What is Being Addressed in this Action?

The EPA is taking final action to approve selected

revisions to 10 Code of State Regulations (CSR) 10-6.062 in the Missouri SIP. The revised State rule was submitted by the State of Missouri on March 7, 2019 and became effective on March 30, 2019. The submission requested revisions to the SIP that include: (1) expanding the materials that crematories and animal incinerators are allowed to burn from 100% human and animal remains to 90% human and animal remains with up to 10% illegal and waste pharmaceutical drugs, (2) modifying operating conditions for crematories and animal incinerators, (3) adjusting sulfur limits on Number 2 diesel oil for consistency with Federal limits, (4) removing "restrictive" words, (5) adding definitions specific to the rule, and (6) making other minor edits. The EPA is finalizing this action because certain revisions to this State rule meet the applicable requirements of the Clean Air Act. EPA is not acting on the State rule revisions that would allow crematories and animal incinerators to burn up to 10% by weight of illegal and waste pharmaceuticals.

II. Have the Requirements for Approval of the SIP Revision Been Met?

The State's submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice of the revisions from August 1, 2018, to October 4, 2018, and held a public hearing on September 27, 2018. The State received and addressed four comments from three sources, including the

EPA. In addition, as explained in the proposal (85 FR 3304, January 21, 2020) and in more detail in the EPA's technical support document (TSD), which is part of this docket, the revision meets the substantive SIP requirements of the CAA, including section 110 and the implementing regulations.

III. The EPA's Responses to Comments

The public comment period on the EPA's proposed rule opened January 21, 2020, the date of its publication in the *Federal Register*, and closed on February 20, 2020. During this period, the EPA received comments from two commenters, which are addressed below.

Comment 1: One commenter submitted several comments regarding revisions in 10 CSR 10-6.062 paragraph (3)(B)2. and subparagraph (3)(B)2.A. that would expand the materials which crematories and animal incinerators are allowed to burn from 100% human and animal remains to 90% human and animal remains with up to 10% illegal and waste pharmaceutical drugs. The comments raise multiple approvability issues. First, the commenter states the EPA failed to provide any analysis or basis for its assertion that allowing crematories and animal incinerators to burn up to 10% pharmaceuticals would not impact the stringency of the SIP or air quality. Second, the commenter states the EPA applied faulty logic in relying on the Commercial and Industrial Solid Waste Incinerator (CISWI) rule's exemption for pathological waste incinerators that burn 90% pathological waste. The commenter contends that the 90% cutoff in the CISWI rule is not

a 10% catch-all burn-what-you-will provision, rather it is intended to distinguish those units designed and used primarily for pathological material destruction from other units. There is no CISWI rule provision that allows for the other 10% of the material to be illegal and waste pharmaceutical drugs. Third, the commenter said the EPA's analysis fails to recognize that incineration of pharmaceutical drugs may be subject to other federal regulations under sections 112 or 129 of the Clean Air Act or the Resource Conservation and Recovery Act (RCRA) depending on their contents. Finally, the commenter states the EPA failed to analyze whether allowing crematories and animal incinerators to burn pharmaceuticals would increase hazardous air pollutant emissions to such an extent that the source would exceed the major source threshold and therefore not be eligible for the construction permit-by-rule per 10 CSR 10-6.062(1)(A).

Response to Comment 1: Because of the issues raised in these comments, the EPA is not acting on the revised language that would allow crematories and animal incinerators to burn up to 10% by weight of illegal and waste pharmaceuticals. Missouri added these provisions as a means of disposing materials collected from drug take-back events and programs. However, the revisions in the State's rule conflict with requirements related to drug take-back programs established by the EPA's final regulation, Management Standards for Hazardous Waste Pharmaceuticals and Amendment to the P075 Listing for Nicotine (84 FR 5816, February 22, 2019). Specifically, the requirements

for drug take-back programs codified at 40 CFR 266.506, list five types of permitted combustors that must be used to destroy waste pharmaceuticals, and crematoriums and animal incinerators are not included on the list for this purpose. The EPA explains in the preamble of the final hazardous waste pharmaceuticals rule that crematories and animal incinerators are not allowed to be used for disposal of materials collected from drug take-back programs because these units typically do not use air pollution control devices to limit toxic air pollutants such as mercury and dioxins and furans. In addition to the hazardous waste pharmaceuticals rule, there may be other state and federal regulations applicable to crematories and animal incinerators. Missouri has represented to the EPA that it is in the process of revising 10 CSR 10-6.062 to remove the problematic language allowing crematories and animal incinerators to burn illegal and waste pharmaceutical drugs. As evidence of Missouri's rulemaking to revise 10 CSR 10-6.062, the rulemaking report summarizing the changes Missouri plans to make is included in this docket.

Comment 2: The commenter states that Missouri's rule lacks necessary enforceability provisions. For instance, the commenter states that the rule is not clear whether the demonstration of 99.9% combustion efficiency applies to sources that rely on manufacturer's specifications, and it is incomplete because it does not specify what pollutants must be demonstrated to meet the 99.9% combustion efficiency. In addition, the commenter states that the compliance provisions for stack tests and

opacity limit requirements fail to identify the appropriate test methods. The commenter says the rule also lacks provisions that apply to owners that follow manufacturers specifications. Finally, the commenter states that the recordkeeping and reporting provisions are inadequate.

Response to Comment 2: To apply for a Missouri permit-by-rule, an applicant completes an application. The application form contains the conditions of operation, including methods of compliance. The applicant signs the form to accept the conditions. This becomes the final permit issued by the Missouri Department of Natural Resources.¹ It is EPA's understanding that Missouri is in the process of updating the application form to reflect the changes made in this revision to the State rule.

The revised rule language clearly specifies the following two compliance demonstration options for crematories and animal incinerators: (1) operate in accordance with manufacturer's specifications or (2) demonstrate a 99.9% combustion efficiency. Higher combustion efficiencies minimize the products of incomplete combustion and associated air pollutants.

The EPA reviewed a number of Missouri construction permits for crematories and animal incinerators that have been issued through the State's formal construction permitting process in accordance with the SIP-approved rule, 10 CSR 10-6.060

Construction Permits Required. The revised compliance options and enforceability provisions in 10 CSR 10-6.062 for crematories

¹Missouri's permit-by-rule application forms may be found here <https://dnr.mo.gov/forms/#AirPollution>.

and animal incinerators are consistent with the language in the permits for these units that have been issued under 10 CSR 10-6.060.

The rule language regarding opacity and reporting and recordkeeping requirements was not materially revised from the provisions in the previously approved SIP. The EPA did not intend to solicit comments on the rule requirements that the state did not materially change in this rulemaking. The agency initially approved 10 CSR 10-6.062 in 2006 (71 FR 38997, July 11, 2006), and the opacity and reporting and recordkeeping provisions have not been revised since then. Courts have indicated that actions, such as the action taken on this rule, do not reopen issues on which the agency was not seeking comment. *Sierra Club v. EPA*, 551 F.3d 1019, 1024 (D.C. Cir. 2008) (citing *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989)) (“Under the reopening doctrine, the time for seeking review starts anew where the agency reopens an issue by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form.”); *Appalachian Power v. EPA*, 251 F.3d 1026 (D.C.Cir. 2004).² There are no known issues with

² *ARTBA v. EPA*, 588 F.3d 1109 at 1114 (rewriting a rule in plain language does not reopen); *Kennecott Utah Copper Corp. v. U.S. Dept. of the Interior*, 88 F.3d 1191 at 1220 (no reopener where agency “merely re-worded the provision” with “no meaningful difference”); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 920 (D.C. Cir. 1998) (dictum) (no reopener where agency action “merely republished an existing rule”); cf. also *Pub. Citizen v. Nuclear Regulatory Com.*, 901 F.2d 147, 150 (D.C. Cir. 1990) (“where an agency’s actions show that it has not merely republished an existing rule in order to propose minor changes to it, but has reconsidered the rule and decided to keep it in effect, challenges to the rule are in order”).

the enforcement of this rule. Therefore, the EPA is finalizing this SIP revision.

Comment 3: The commenter stated that the EPA failed to provide a basis for proposing to approve the addition of eleven (11) definitions in section (2) of the rule. The commenter states it appears that the EPA is assuming that previously approved definitions can be moved into the rule. The commenter finds that it is unclear why the definition of "incinerator" was moved into this rule because it covers refuse material and open burning. The commenter also states that the definition of "construction" moved into this rule does not match the definition of construction in the permitting rule that the owner/operator seeks exemption from [10 CSR 10-6.060] and the reason for the difference is not explained. Additionally, the commenter notes that the definition of "printing" differs from the section that covers printing operations (paragraph (3)(B)1.), which is more encompassing. Finally, the commenter states the definition of "closed container" speaks to requirements regarding spilling and leaking the contents and fails to require that the closed container prevents volatile organic compound (VOC) fugitives.

Response to Comment 3: As explained in detail in the TSD, the definitions inserted into 10 CSR 10-6.062 section (2) are the same definitions included in the SIP-approved 10 CSR 10-6.020 *Definitions and Common Reference Tables*, and therefore there is no change to the stringency of the SIP. As explained above, the EPA did not intend to solicit comments on the portions of the

rule that the State did not materially change in this rulemaking. Furthermore, the addition of these general definitions in section (2) of the rule does not impact any of the rule's conditions or requirements. The provisions in the permit-by-rule for each source category covered by 10 CSR 10-6.062 contain greater specificity related to usage of the terms.

Comment 4: An anonymous commenter recommended that the revisions not be approved. The commenter stated that instead more stringent protections and regulations with penalties should be put in place to better protect the environment and public.

Response to Comment 4: The permit-by-rule for each source category in subsection (3)(B) of the rule includes enforcement provisions. In addition, subsection (3)(C) includes provisions for revoking a permit-by-rule and penalties for non-compliance, and section (4) includes reporting and recordkeeping requirements. There are no known issues with the enforcement of this rule. For the reasons stated above and in the proposal, the EPA has determined that the rule revisions comply with the requirements of the Clean Air Act.

IV. What Action is the EPA Taking?

The EPA is approving all revisions from the March 30, 2019, State effective date version of 10 CSR 10-6.062 into the Missouri SIP, except for revisions to paragraph (3)(B)2. and subparagraph (3)(B)2.A. We are taking final action after consideration of the comments received from two commenters on the notice of proposed rulemaking.

V. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Missouri Regulations described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.³

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law

³ 62 FR 27968, May 22, 1997.

as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b) (1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b) (2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 21, 2021.

Edward H. Chu,
Acting Regional Administrator,
Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

PART 52--APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart AA-Missouri

2. In §52.1320, the table in paragraph (c) is amended by revising the entry "10-6.062" to read as follows:

§52.1320 Identification of plan.

* * * * *

(c) * * *

EPA-Approved Missouri Regulations

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
* * * * *				
Chapter 6-Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
* * * * *				
10-6.062	Construction Permits By Rule	3/30/2019	[insert date of publication in the Federal Register], [insert Federal Register citation]	EPA is approving all revisions from the 3/30/2019 State effective date version of 10 CSR 10-6.062, except for paragraph (3) (B) 2. and subparagraph (3) (B) 2.A.
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